

Honorable James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PACIFIC MARKET, INC., A  
WASHINGTON CORPORATION, d/b/a  
PACIFIC MARKET INTERNATIONAL,  
  
Plaintiff,

v.

THERMOS L.L.C., a Delaware limited  
liability company,  
  
Defendant.

No. CV03-1261-JLR

**ANSWER TO SECOND AMENDED  
COMPLAINT**

**JURY TRIAL DEMANDED**

Defendant Thermos L.L.C. ("Thermos"), answers the Second Amended Complaint as follows:

**ANSWER**

1. Thermos is without sufficient information or belief to form an answer to the allegations of paragraph 1 of the Second Amended Complaint and therefore denies each such allegation.

2. Thermos admits the allegations of paragraph 2 of the Second Amended Complaint.

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1           3.       Thermos admits that the Second Amended Complaint alleges causes of action  
2 under 15 U.S.C. § 1125(a) and Washington State Consumer Protection Act R.C.W. 19.86.020  
3 et seq. and common law. Thermos further admits that this Court has jurisdiction of the  
4 federal claim pursuant to 28 U.S.C. §§ 1338(a) and (b) and supplemental jurisdiction under 28  
5 U.S.C. § 1367(a). Thermos denies each and every remaining allegation of paragraph 3 of the  
6 Second Amended Complaint.

7           4.       Thermos admits that venue in this action is proper in this judicial district  
8 pursuant to 28 U.S.C. § 1791(b)(1). Thermos denies the remaining allegations of paragraph 4  
9 of the Second Amended Complaint.

10          5.       Thermos is without sufficient information or belief to form an answer to the  
11 allegations of paragraph 5 of the Second Amended Complaint and therefore denies each such  
12 allegation.

13          6.       Thermos is without sufficient information or belief to form an answer to the  
14 allegations of paragraph 6 of the Second Amended Complaint and therefore denies each such  
15 allegation.

16          7.       Thermos denies the allegations of paragraph 7 of the Second Amended  
17 Complaint.

18          8.       Thermos denies the allegations of paragraph 8 of the Second Amended  
19 Complaint.

20          9.       Thermos admits the allegations of paragraph 9 of the Second Amended  
21 Complaint.

22          10.       Thermos admits that, since at least as early as September, 2002, Thermos has  
23 offered to sell insulated bottles to wholesale distributors and to retailers, including Target  
24 Stores, for resale. Thermos denies that the bottles shown in Exhibits C and D of the Second  
25 Amended Complaint accurately depict the appearance of bottles that it has offered to sell  
26 because neither of these exhibits show the trademark label that is prominently affixed to the

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1 side wall of the bottles that Thermos has offered for sale. Thermos is without sufficient  
2 information or belief to form an answer to the remaining allegations of paragraph 10 of the  
3 Second Amended Complaint and therefore denies each such remaining allegation.

4 11. Thermos admits that, since at least as early as September, 2002, Thermos has  
5 sold insulated bottles in this Judicial District. Thermos denies that the bottles shown in  
6 Exhibits C and D of the Second Amended Complaint accurately depict the appearance of  
7 bottles that it has sold because neither of these exhibits show the trademark label that is  
8 prominently affixed to the side wall of the bottles sold by Thermos. Thermos further denies  
9 the remaining allegations of paragraph 11 of the Second Amended Complaint.

10 12. Thermos is without sufficient information or belief to form an answer to the  
11 allegation regarding the wholesale price of Stanley's products and therefore denies such  
12 allegation in paragraph 12 of the Second Amended Complaint. Thermos denies the remaining  
13 allegations of paragraph 12 of the Second Amended Complaint.

14 13. Thermos realleges and incorporate by reference each response contained in  
15 paragraphs 1-12 of its answer as if fully set forth herein in response to the allegations of  
16 paragraph 13 of the Second Amended Complaint.

17 14. Thermos denies the allegations of paragraph 14 of the Second Amended  
18 Complaint.

19 15. Thermos denies the allegations of paragraph 15 of the Second Amended  
20 Complaint.

21 16. Thermos denies the allegations of paragraph 16 of the Second Amended  
22 Complaint.

23 17. Thermos realleges and incorporates by reference each response contained in  
24 paragraphs 1-16 of its answer as if fully set forth herein in response to the allegations of  
25 paragraph 17 of the Second Amended Complaint.  
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1 18. Thermos denies the allegations of paragraph 18 of the Second Amended  
2 Complaint.

3 19. Thermos denies the allegations of paragraph 19 of the Second Amended  
4 Complaint.

5 20. Thermos denies the allegations of paragraph 20 of the Second Amended  
6 Complaint.

7 21. Thermos realleges and incorporates by reference each response contained in  
8 paragraphs 1-20 of its answer as if fully set forth herein in response to the allegations of  
9 paragraph 21 of the Second Amended Complaint.

10 22. Thermos denies the allegations of paragraph 22 of the Second Amended  
11 Complaint.

12 23. Thermos denies the allegations of paragraph 23 of the Second Amended  
13 Complaint.

14 24. Thermos denies the allegations of paragraph 24 of the Second Amended  
15 Complaint.

16 **DEFENSES**

17 1. The shape and overall look of the Stanley vacuum insulated bottles shown in  
18 Exhibits A and B to the Second Amended Complaint is non-distinctive.

19 2. The shape and overall look of the Stanley vacuum insulated bottles shown in  
20 Exhibits A and B to the Second Amended Complaint is generic.

21 3. The shape and overall look of the Stanley vacuum insulated bottles shown in  
22 Exhibits A and B to the Second Amended Complaint is functional.

23 4. Thermos prominently labels the insulated bottles shown in Exhibits C and D to  
24 the Second Amended Complaint with Thermos' distinctive trademarks and therefore,  
25 Thermos has not palmed off its insulated bottles as those of Plaintiffs. Further, the use of  
26 Thermos' distinctive trademarks precludes any likelihood of confusion.

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7. In the alternative, and on information and belief, Plaintiffs and their predecessors in interest abandoned any trade dress rights in the appearance of the insulated bottles shown in Exhibits A and B do the Second Amended Complaint prior to the filing of this action.

9. In the alternative, and on information and belief, the claims alleged in the Second Amended Complaint are barred by the doctrine of laches.

10. In the alternative, and on information and belief, the claims alleged in the Second Amended Complaint are barred by the doctrine of estoppel.

WHEREFORE, Thermos prays for the entry of judgment by this Court against Plaintiffs as follows:

(b) Plaintiffs' requests for an award of damages, costs, attorney fees and injunctive relief be denied.

(d) A finding that Thermos has not violated § 43(a) of the Lanham Act;

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- 1 (e) An award of Thermos' costs and actual and reasonable attorneys' fees; and  
2 (f) Such other relief as this Court deems appropriate.

3 DATED this 12th day of January, 2005.  
4

5 PRESTON GATES & ELLIS LLP

6  
7 By   
8 Marc C. Levy, WSBA #19203

9 Attorneys for Defendant  
10 Thermos L.L.C.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2005, I filed the foregoing **ANSWER TO SECOND AMENDED COMPLAINT – JURY TRIAL DEMANDED** with the Clerk of the Court, using the CM/ECF system which will send electronic notification of such filing to the following:

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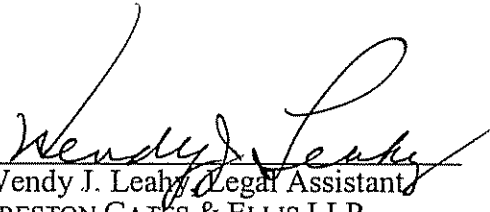
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